No. 18-1368

In the Supreme Court of the United States

SAN DIEGO GAS & ELECTRIC COMPANY, PETITIONER

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT

MOTION FOR LEAVE TO FILE AND BRIEF FOR EDISON ELECTRIC INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONER

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MOTION OF THE EDISON ELECTRIC INSTITUTE FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* SUPPORTING PETITIONER

The Edison Electric Institute ("EEI") respectfully moves for leave to file the accompanying *amicus curiae* brief in support of petitioner San Diego Gas & Electric Company ("SDG&E"). Pursuant to Rule 37.2(a) of this Court, counsel of record for all parties received timely notice of EEI's intent to file an *amicus* brief. Counsel for SDG&E, the Public Utilities Commission for the State of California, and three of the other eight parties to the proceeding below have consented to the filing of this brief. However, counsel for San Diego Consumers' Action Network, one of the real parties in interest before the California Court of Appeal, has withheld consent. The other parties to the proceeding below did not respond to EEI's request for consent. Accordingly, EEI submits this motion pursuant to Rule 37.2(b).

EEI is the trade association that represents all private, investor-owned U.S. electric companies, including petitioner San Diego Gas and Electric Company. Its members provide electricity for approximately 220 million Americans and operate in all 50 states and the District of Columbia. EEI regularly files *amicus curiae* briefs in cases that raise issues of national concern for the electric power industry.

EEI's brief highlights the importance of the constitutional issues at stake in this petition to investor-owned electric companies nationwide as well as the broader economy. California's unconstitutional approach to wildfire liability threatens the financial viability of California's investor-owned electric companies and, if left uncorrected, could impair their ability to provide reliable and affordable power to California.

The liability doctrines at issue could lead to disastrous consequences not only for EEI member electric companies, but also their employees and customers. Further, given the vital role that reliable electricity plays in our economy, the integration of California's investor-owned electric companies with the broader national economy, and the outsized influence of California's economy on national gross domestic product, California's wildfire liability regime could severely impact the broader California and national economies. EEI's proposed brief *amicus curiae* provides a unique perspective on these and other issues and would assist the Court in its consideration of the petition.

For the foregoing reasons, EEI respectfully requests that leave to file be granted.

Respectfully submitted.

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INTEREST OF *AMICUS CURIAE*[1]

Edison Electric Institute ("EEI") is the trade association that represents all U.S. private, investor-owned electric companies, including San Diego Gas and Electric Company ("SDG&E"). Its members provide electricity for approximately 220 million Americans and operate in all 50 states and the District of Columbia. The electric power industry supports more than seven million jobs in communities across the United States and contributes $880 billion to the U.S. economy through direct employment, contracts and supply chains, investments, and the jobs and investments that are induced by these activities. Collectively, these activities and investments represent five percent of the nation's gross domestic product. Organized in 1933, EEI works to promote the long-term success of the electric power industry in its vital mission to provide electricity to foster economic progress and improve quality of life.

In the proceedings below, the California Public Utilities Commission ("CPUC") denied SDG&E's application to recover wildfire costs and California courts allowed that decision to stand, thereby establishing a precedent that threatens the financial viability of EEI's member companies in California. Against the backdrop of California's inverse condemnation doc-

[1] Pursuant to Rule 37.6, no counsel for any party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No entity or person, aside from the *amicus curiae* and its counsel, made any monetary contribution for the preparation or submission of this brief. Counsel for the parties received timely notice.

trine—under which California courts have held electric companies strictly liable for wildfire damages—the California Court of Appeal's affirmance of the CPUC decision effectively requires California's electric companies to become insurers of last resort, and, regardless of fault, to be responsible for potentially billions of dollars of wildfire damages every year without the ability to recover those costs. EEI therefore has a strong interest in this Court's review of the constitutional boundaries that protect private entities from being forced to bear the full brunt of natural disasters.

SUMMARY OF ARGUMENT

This case is of great importance to the California and national economies, which are entirely dependent on reliable and affordable electric power. Electricity is essential to nearly every facet of modern life, including national security, health, welfare, communications, finance, manufacturing, transportation, food, water, heating, cooling, lighting, computers and electronics, commercial enterprise, entertainment, and even leisure. California's unconstitutional approach to wildfire liability poses a danger to this way of life by threatening to cripple the state's investor-owned electric companies, which supply some 75 percent of California's electricity.[2]

To provide reliable and safe power to their millions of customers, California's investor-owned electric companies (like other regulated utilities) rely on a stable "regulatory compact" with the state, under which electric companies are obligated to serve all customers in

[2] Simon Baker & Elizaveta Malashenko, *Overview of California Energy Services & Wildfire Risk* 4 (Feb. 25, 2019), http://bit.ly/2YWmncq.

their area in exchange for a monopoly franchise and approved electricity rates that provide a reasonable return on their incurred costs. The shared understanding that utilities are entitled to a reasonable rate of return allows investor-owned electric companies to raise large amounts of capital in the financial markets, without which they could not finance construction, operation, and maintenance of the expensive and long-lived infrastructure necessary to provide reliable and affordable power to the general public.

California's approach to wildfire damages eviscerates this regulatory compact. Specifically, California courts have held that private electric companies may be held strictly liable for wildfire damages under the state's inverse condemnation doctrine, exposing California's investor-owned electric companies to massive wildfire costs regardless of fault. At the same time, the CPUC has made clear that private electric companies are not guaranteed the ability to recover those costs from customers by incorporating them into approved rates. Combined, these aspects of California's regulatory regime violate the "regulatory compact" and pose an unsustainable financial burden on investor-owned electric companies.

But the question's practical importance is broader still. By crippling private electric companies, California's regime ultimately harms their customers, employees, shareholders (often "dividend investors," such as retirees), and business partners. For example, in response to California's actions stock prices have fallen and rating agencies have already downgraded the investor-owned electric companies' credit ratings, which has in turn made it more difficult and expensive for them to raise capital. This threatens their ability

to provide reliable and affordable energy, and subjects customers to increased electricity rates or, even worse, unreliable service. Similarly, by calling into question the financial viability of investor-owned electric companies, California has put tens of thousands of well-paying jobs at risk.

The decision below also poses a significant threat to the California and national economies. Broad ripple effects have in fact already occurred, including credit downgrades of power producing companies that sell power to California investor-owned electric companies. Even more alarming, to the extent that electric utilities are unable to provide reliable and affordable service as a result of the decision, the fallout to the broader economy could be staggering, as demonstrated by California's 2000-2001 electricity crisis that resulted in $45 billion in economic losses. Given California's outsized importance to the national gross domestic product, this is a problem of national scale. Moreover, California's unconstitutional approach to inverse condemnation and cost-recovery may rapidly spread to other states seeking a politically expedient way to compensate the general public for damages following natural disasters. This Court's intervention is urgently warranted.

ARGUMENT

I. THE "REGULATORY COMPACT" BETWEEN THE STATE AND INVESTOR-OWNED ELECTRIC COMPANIES IS CRITICAL TO RELIABLE AND AFFORDABLE POWER

Investor-owned electric companies operate in all 50 states and are responsible for providing electricity to

some 220 million Americans. As natural monopolies[3] that provide essential services, investor-owned electric companies are subject to extensive regulation at the federal and state levels, including regulation of customer rates.[4]

Under what is known as the "regulatory compact,"[5] the state balances the interests of utilities and their electric customers by regulating rates and requiring investor-owned electric companies to serve all customers in their area.[6] In exchange, investor-owned electric companies are granted a monopoly franchise, as well as regulated rates that permit the recovery of prudently incurred costs, plus a reasonable rate of return.[7] These are known as "cost of service" rates and are set by state economic regulators, such as the CPUC.[8] "Cost of service" ratemaking is typically based on a range of factors, including investments and other expenditures of resources that are intended to ensure that the electric company can provide service to its customers. Such expenditures are made with the expectation that the company can recover its investments through rates charged to customers.

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[3] Natural monopolies exist where a single firm is able to provide a good or service to a market at a lower average cost than two or more firms because of economies of scale or other network economies. See William W. Sharkey, *The Theory of Natural Monopoly* (1982).

[4] Jim Lazar, *Electricity Regulation in the U.S.: A Guide* 3 (2d ed. 2016), http://bit.ly/30E1KmX.

[5] *Id.* at 6.

[6] *Id.* at 5-6.

[7] *Id.* at 5.

[8] *Ibid.*

Among its other functions,[9] the regulatory compact's guarantee of cost recovery and a reasonable rate of return ensures that the state does not violate the Constitution by taking investor-owned electric companies' property. As this Court explained nearly a century ago in *Bluefield Waterworks & Improvement Co.* v. *Public Service Commission*, "[r]ates which are not sufficient to yield a reasonable return on the value of the property used [by the utility company] to render * * * service are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment." 262 U.S. 679, 690 (1923).[10] And because investor-owned electric companies have long relied on the regulatory compact, violating that compact risks "interfer[ing] with [their] investment-backed expectations." *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 124 (1978).

The regulatory compact also ensures that investor-owned electric companies are consistently able to provide reliable and affordable power over the long term. Specifically, by providing a consistent rate of return on

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[9] These other functions include spreading costs across all electricity customers and promoting intergenerational equity by ensuring that the large capital investments needed to provide service are spread out over the life of those investments.

[10] *Bluefield* was primarily a due process case. However, consistent with "the reduction since the mid-1930s in the role of the due process clause as an instrument of judicial oversight of economic regulation," the constitutional principle *Bluefield* articulates—that "state regulation that interferes too greatly with an owner's economic use of property" violates the Fifth and Fourteenth Amendments—has "moved from the protection of the due process clause to that of the takings clause." *Tenoco Oil Co.* v. *Dep't of Consumer Affairs*, 876 F.2d 1013, 1020 (1st Cir. 1989).

incurred costs, the regulatory compact allows investor-owned electric companies to attract sufficient investment to build and maintain infrastructure. *Bluefield,* 262 U.S. at 693 ("The return should be reasonably sufficient to * * * enable [the utility] to raise the money necessary for the proper discharge of its public duties."); *Fed. Power Comm'n* v. *Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944) (the rate of return "should be sufficient * * * to attract capital"). Investing in infrastructure is critical to providing reliable electricity, which requires "control[ing] and coordinat[ing] * * * electricity production at thousands of generators, moving electricity across vast interconnected networks of transmission lines, and ultimately delivering the electricity to millions of customers by means of extensive distribution networks."[11] Given the scale and importance of electric infrastructure, which provides a resource that is essential to nearly every facet of modern life (including national security, health, welfare, communications, finance, manufacturing, transportation, food, water, heating, cooling, lighting, computers and electronics, commercial enterprise, entertainment, and leisure),[12] the levels of investment required are substantial, on the order of billions of dollars for a single large investor-owned utility over a 10-year pe-

[11] Federal Energy Regulatory Commission, *Reliability Primer* 9 (2016), https://www.ferc.gov/legal/staff-reports/2016/reliability-primer.pdf.

[12] *Ibid.*

riod. Indeed, EEI's member electric companies collectively invest, on average, more than $100 billion annually.[13]

II. CALIFORNIA'S WILDFIRE LIABILITY REGIME VIOLATES THE REGULATORY COMPACT AND THREATENS THE ABILITY OF INVESTOR-OWNED ELECTRIC COMPANIES TO PROVIDE RELIABLE AND AFFORDABLE POWER

Under California's unconstitutional approach to apportioning wildfire damages, investor-owned electric companies may be held strictly liable for massive amounts of wildfire damage and then denied the ability to recover those costs through rates. As SDG&E explains (Pet. 6-7), California appellate courts have repeatedly determined that investor-owned electric companies can be liable for third-party damages, including wildfire damages, under an inverse condemnation theory.

California's inverse condemnation doctrine is rooted in the state constitution's takings clause, which provides that "[p]rivate property may be taken or damaged for a public use and only when just compensation * * * has first been paid to, or into court for, the owner." Cal. Const. art. I, § 19(a). Inverse condemnation is a strict liability doctrine in California. See *Albers* v. *Cty. of Los Angeles*, 398 P.2d 129, 137 (Cal. 1965). Subject to certain limited exceptions,[14] "any actual physical injury to real property proximately

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[13] EEI, *Delivering America's Energy Future: Electric Power Industry Outlook* 6 (Feb. 6, 2019), http://bit.ly/2M043xI.

[14] The California Supreme court has identified "two strains of decisions in which the urgency or particular importance of the

caused by [a public] improvement as deliberately designed and constructed is compensable under [the California takings clause] whether foreseeable or not." *Albers*, 398 P.2d at 137. This strict liability standard is driven primarily by the policy underlying the state's takings clause, which is "to distribute throughout the community the loss inflicted upon the individual by the making of the public improvements." *Id.* at 136. Because "the cost of such damage can better be absorbed, and with infinitely less hardship, by the taxpayers as a whole than by the owners of the individual parcels damaged," the California Supreme Court has concluded that requiring property owners to demonstrate that the damages were foreseeable or intended by the government would leave some owners "uncompensated, * * * contribut[ing] more than [their] proper share to the public undertaking." *Id.* at 137.

Given this loss-spreading rationale, inverse condemnation claims in California have historically applied to governmental and other public entities whose actions constitute "public use" and have the ability to spread the costs across the population via taxes.[15]

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governmental conduct involved was so overriding that considerations of public policy inveighed against a rule rendering the acting public entity liable absent fault." *Holtz* v. *Superior Ct.*, 475 P.2d 441, 446 (Cal. 1970). The first exception "involve[s] noncompensable damages inflicted in the proper exercise of the police power." *Ibid.* (internal quotation marks omitted). The second "encompasse[s] those cases in which the state at common law had the right to inflict the damage." *Ibid.* (internal quotation marks omitted).

[15] See, *e.g.*, *Albers*, 398 P.2d at 131 (plaintiff asserted inverse condemnation claims against a county); *Holtz*, 475 P.2d at 442 (same); *Ingram* v. *City of Redondo Beach*, 119 Cal. Rptr. 688 (Cal.

This cost-spreading ability is crucial because the doctrine holds public entities liable irrespective of fault. And the doctrine has been expansively interpreted in other ways, including the California Supreme Court's holding that a governmental entity may be held strictly liable even where the public improvement is "only one of several concurrent causes" of the claimed injury, so long as it is a "substantial cause." *Belair* v. *Riverside Cty. Flood Control Dist.*, 764 P.2d 1070, 1075 (Cal. 1988). This application of strict liability under a broad theory of causation greatly expands the scope of damages that can be recovered. While generous to plaintiffs seeking recovery for property damage, such an approach is only sustainable where the defendant can spread its loss across the broader population.

Despite this history and the clear rationale for limiting inverse condemnation claims to public entities, California courts have now extended the doctrine to allow inverse condemnation claims against investor-owned electric companies. See *Barham* v. *S. Cal. Edison Co.,* 88 Cal. Rptr. 2d 424, (Cal. Ct. App. 1999); *Pacific Bell Tel. Co.* v. *S. Cal. Edison Co.*, 146 Cal. Rptr. 3d 568 (Cal. Ct. App. 2012).

In so holding, California courts have reasoned that privately-owned electric companies are sufficiently akin to public entities for the purpose of inverse condemnation—a conclusion that rested on the expectation that investor-owned electric companies can spread the loss of any incurred damages across their ratepayers in a manner similar to a public entity's ability to spread losses across taxpayers. *Barham*, 88

Ct. App. 1975) (plaintiff asserted inverse condemnation claims against a city).

Cal. Rptr. 2d at 430 (holding electric company liable to fulfill the "fundamental policy underlying the concept of inverse condemnation * * * to spread among the benefiting community any burden disproportionately borne by a member of that community, to establish a public undertaking for the benefit of all."); *Pacific Bell*, 146 Cal. Rptr. 3d at 573 (rejecting argument that electric company would not be able to spread losses through its rates).

The decision below turns that rationale on its head by upholding the *denial* of SDG&E's application to recover $379 million of inverse condemnation wildfire damages. See Pet. App. 6a. The CPUC explained that "[i]nverse [c]ondemnation principles are not relevant to a Commission * * * review" of cost-recovery applications. *Id.* at 75a. Rather, the Commission applied a "prudent manager" standard that effectively amounted to a post-hoc review, creating significant uncertainty around the ability of investor-owned electric companies to obtain cost recovery.

Not only does the decision undermine the rationale for extending inverse condemnation to private electric companies, it also violates the regulatory compact. As explained above, see p. 5, *supra*, the compact requires investor-owned electric companies to serve all customers in their service area at a regulated rate in exchange for cost-recovery plus a reasonable rate of return. Under the current regime, investor-owned electric companies are still required to serve all customers but are forced to bear massive costs—imposed under a strict liability doctrine—without any certainty of recovering them.

Undermining the regulatory compact severely threatens the investor-owned electric companies' ability to ensure reliable and affordable power (including their ability to attract investment and raise funds in the financial markets), as demonstrated by the negative consequences already flowing from the CPUC's denial of SDG&E's cost-recovery application. First, the regime has already visited immediate and severe direct financial consequences on private electric companies in California, which have been exposed to massive liability in recent years and face additional liability in the future. For example, PG&E may be liable for more than $30 billion in damages as a result of the 2017 Northern California fires and the 2018 Camp fire.[16] Similarly, Southern California Edison ("SCE") faces $4.7 billion in liability as a result of fires in 2017 and 2018, and has expressed uncertainty regarding its ability to recover those costs given the CPUC's denial of SDG&E's cost-recovery application.[17] To put these numbers in perspective, $30 billion is 21.5 times PG&E's $1.4 billion wildfire insurance policy,[18] 14.3 times larger than its 2017 pretax income ($2.1 billion),[19] and 2.3 times its total equity ($12.9 billion).[20] SCE's liability is also significant: $4.7 billion is 4.7

[16] PG&E Corp., Annual Report (Form 10-K), at 32 (Feb. 28, 2019) (PG&E 2018 10-K).

[17] Edison International, Annual Report (Form 10-K), at 5 (Feb. 28, 2019) (SCE 2018 10-K).

[18] PG&E 2018 10-K, at 163.

[19] PG&E reported losses of $10.1 billion in 2018 before taxes. Compare PG&E 2018 10-K, at 94 (reporting negative income for 2018), with PG&E Corp., Annual Report (Form 10-K), at 86 (Feb. 9, 2018) (reporting $2.1 billion in income for 2017).

[20] PG&E 2018 10-K, at 97.

times its $1 billion wildfire insurance policy,[21] 4.25 times larger than its 2017 pretax income ($1.1 billion),[22] and 34 percent of its total equity ($13.79 billion).[23] Given the increasing prevalence of wildfires in California, the scope of this liability is likely to increase. Such exposure is financially unsustainable and constitutes an existential threat to investor-owned electric companies, as demonstrated by PG&E's bankruptcy in January 2019.[24]

Second, such liability undermines the privately-owned electric companies' ability to attract outside investment, which in turn directly affects their ability to provide reliable and affordable power. As discussed above, the ability to attract capital is one of the express purposes of ensuring, through the regulatory compact, that investor-owned electric companies recover a reasonable rate of return on their incurred costs. That capital, in turn, is essential for those companies to finance and build necessary infrastructure. The denial of SDG&E's application to recover costs has already undermined other privately-owned electric companies' ability to attract investment. In the two years since the CPUC's decision, California's investor-owned electric companies have faced multiple downgrades in

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[21] SCE 2018 10-K, at 107.

[22] SCE reported losses of $885 million in 2018 before taxes. Compare SCE 2018 10-K, at 53 (reporting negative income for 2018), with SCE Corp., Annual Report (Form 10-K), at 51 (Feb. 22, 2018) (reporting $1.1 billion in income for 2017).

[23] SCE 2018 10-K, at 55.

[24] See PG&E 2018 10-K, at 8 (describing PG&E's Chapter 11 proceedings and noting that the 2017 and 2018 northern California wildfires "raise substantial doubt about PG&E['s] * * * ability to continue as [a] going concern[]").

credit ratings. Indeed, in a direct response to the CPUC's decision, Moody's Investors Service concluded that the decision was a credit negative for all California utilities because "utilities can be held strictly liable for damages caused by wildfires" and the "SDG&E ruling may make it difficult for utilities to meet the CPUC's prudence standard * * * ."[25] Since then, SDG&E and other investor-owned electric companies have seen multiple credit downgrades as ratings agencies continued to react to the combination of inverse condemnation liability and uncertain cost recovery.[26] According to one analyst, the downgrades are driven by the lack of "sufficient regulatory protections due to California's common law application of the legal doctrine of inverse condemnation."[27]

The situation has grown particularly dire for PG&E, which saw multiple downgrades by Fitch, S&P, and Moody's to ratings below investment grade.[28] Moreover, at the time of this filing, PG&E's stock is

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[25] Moody's Investor Service, *San Diego Gas & Electric Issuer Comment* (Dec. 4, 2017); see also Frank C. Graves et al., *California Megafires: Approaches for Risk Compensation and Financial Resiliency Against Extreme Events* 16 (Oct. 1, 2018), http://bit.ly/2VNT5uA (quoting the December 4, 2017, Moody's Issuer Comment).

[26] Usman Khalid, *S&P Downgrades SDG&E, SoCalEd, Edison International on Wildfire, Climate Risk* (Jan. 22, 2019), http://bit.ly/2WXe7sd; Allison McNeely et al., *PG&E Gets Second Junk Grade After Moody's Credit Downgrade* (Jan. 10, 2019), https://bloom.bg/2HOLeZ2.

[27] Khalid, *supra* note 26.

[28] PG&E 2018 10-K, at 65; McNeely, *supra* note 26 (noting that both Moody's and S&P Global Ratings cut PG&E's credit rating to junk).

selling at approximately $18 a share, a significant drop from October 11, 2017—the day before the 2017 Northern California wildfires began—when PG&E was trading near $70. In the view of some analysts, the "swift deterioration of PG&E's financial health only heightens the uncertainties facing all of California's other electric utilities."[29] In short, the general perception among investors is that California's investor-owned electric companies are simply "uninvestable right now."[30]

III. THE DECISION BELOW COULD HAVE SEVERE LONG-TERM CONSEQUENCES FOR CUSTOMERS, EMPLOYEES, SHAREHOLDERS, AND THE ECONOMY

The threat posed by California's wildfire liability regime extends beyond California's investor-owned electric companies, endangering their customers, employees, shareholders, and the broader economy. First and most immediately, any handicap to the investor-owned electric companies' ability to raise capital threatens their ability to build, improve, and maintain the infrastructure necessary to provide reliable electric service, directly harming customers. To the extent that service itself is compromised, customers will experience immediate harm. As noted above, reliable electric service is the backbone of modern life. Not only is it critical to California's businesses and nearly every aspect of daily life, lack of reliable service can have deadly consequences. For example, a study by researchers at Johns Hopkins and Yale found that

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[29] Khalid, *supra* note 26 (quoting a S&P Global Ratings analyst).

[30] Mike Yamamoto, *Market Notes: Tuesday, December 12, 2017, Investitute* (Dec. 12, 2017), https://bit.ly/2Wrf4MA.

during New York City's 2003 blackout—which lasted up to a full day in some parts of the city—"total mortality rose 28 percent, resulting in approximately 90 excess deaths."[31] The study explained that increased mortality was likely caused by a variety of blackout conditions, including subway and elevator entrapments, lack of potable water, pharmacy closures, lack of power for in-home medical equipment such as ventilators, cellular service failure, lack of power in certain emergency rooms, and increased exposure to heat.[32]

While blackouts are extreme and unlikely events, the financial harms to privately-owned electric companies when capital cannot be raised are passed along to consumers in other ways. As investor-owned electric companies become less credit-worthy, the cost of raising capital increases, which is passed along to customers through higher rates. For example, PG&E recently filed a proposal with the CPUC that, if approved, would increase its approved cost of capital by $1.2 billion, resulting in a 7 percent increase of monthly costs for some customers.[33] Similarly, costs associated with

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[31] G. Brooke Anderson & Michelle L. Bell, *Lights Out: Impact of the August 2003 Power Outage on Mortality in New York, NY*, 23 Epidemiology 189, 190 (2012). While the study was limited to mortality rates in New York City, the blackout extended to large portions of the Northeastern and Midwestern United States.

[32] *Id.* at 191.

[33] Press Release, PG&E Corp., *PG&E Submits Updated Financing Proposal for Safety and Reliability Infrastructure Investments for 16 Million Customers* (Apr. 22, 2019), http://bit.ly/2QktyIg. PG&E has also noted that the credit downgrades have "required [it] to post additional collateral under its commodity purchase agreements" and that it "has been exposed to significant constraints on its customary trade credit." PG&E 2018 10-K, at 65.

PG&E's bankruptcy could also be passed along to its consumers.[34]

Second, the financial harms to investor-owned electric companies threaten thousands of high-quality, well-paying jobs in California and potentially across the nation.[35] The electric power industry is directly responsible for 2.7 million jobs—and supports another 4.4 million induced jobs—across the United States. In total, the industry supports more than seven million jobs, which constitutes approximately five percent of all jobs in the United States.[36] Further, employment in the industry is well-paying and stable; the median annual wages for direct electric power industry employees were $73,000 in 2015, the latest year for which data are available.[37] This is more than twice the national average.[38] With benefits, including health care

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Notably, the CPUC's decision below denied SDG&E's cost-recovery application without any consideration of these additional costs, which will ultimately fall on ratepayers as a result of the decision.

[34] PG&E's 2001 bankruptcy resulted in a 2003 settlement that allowed the electric company to pass along roughly $7 billion in costs to its customers through increased rates.

[35] See, *e.g.*, Pacific Gas & Electric Corp., Company Profile, http://bit.ly/2VHesCW (last visited May 16, 2019) (PG&E employs approximately 24,000 employees).

[36] See M.J. Bradley & Associates, *Powering America: The Economic and Workforce Contributions of the U.S. Electric Power Industry* 6, 9 (2017), http://bit.ly/2VwRvgw (Powering America).

[37] *Id.* at 9.

[38] U.S. Census Bureau, *Quick-Facts: United States* (last visited May 22, 2019), http://bit.ly/2HLyKkQ (mean per capita income in the United States is $31,177).

and retirement contributions, median annual compensation exceeds $100,000.[39] Nearly every job category in the industry earns a median wage of $30 or more per hour, plus health and retirement benefits. Many of these skilled, well-paying jobs do not require a four-year college degree, unlike many other jobs with similar pay and benefits.[40] And while employment opportunities in the industry are expected to grow for various types of workers over the next decade, these opportunities rely on the continued financial health and viability of investor-owned electric companies and are therefore put at risk by the decision below.

Third, shareholders have already suffered, and will continue to suffer direct economic losses as the value of stock declines and dividends are suspended. As noted earlier, PG&E's stock is now trading at approximately $18 per share, down from nearly $70 before the 2017 Northern California Wildfires. Similarly, Edison International, which owns Southern California Edison, is trading at approximately $61 per share at the time of this filing, down from $80.55 in November 2017. Dividends to PG&E shareholders have also been suspended since December 2017, when PG&E was forced to conserve financial resources to pay potential inverse condemnation claims associated with the 2017 Northern California wildfires.[41] While dividend suspensions do occur in some industries, they are highly

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[39] Powering America 9.

[40] *Id.* at 13.

[41] PG&E 2018 10-K, at 67; Press Release, PG&E Corp., *PG&E Announces Suspension of Dividend, Citing Uncertainty to Causes and Potential Liabilities Associated with Northern California Wildfires* (Dec. 20, 2017), http://bit.ly/2YHeAiA.

unusual among private electric companies, a characteristic that often makes these companies attractive to investors in the first place. In fact, privately-owned electric companies are generally among the most popular stocks for dividend investors because their earnings are comparatively stable and they offer higher than average dividend yields.[42] This is so because they provide non-discretionary services and because they are mature businesses with less room for growth and expansion, which allows them to pay out higher portions of their earnings.[43] Because of this stability, many dividend investors are retirees looking to invest in stocks that generate safe income.[44] PG&E's dividend suspension is therefore highly unusual, as demonstrated by the fact that every single EEI index company[45] paid a dividend from the years 2011 to 2016.[46]

These harms are likely to have negative consequences for the broader California and nationwide economies. Businesses that partner with investor-

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[42] *High Dividend Stocks-May 2019*, Simply Safe Dividends (May 2, 2019), http://bit.ly/30zihJ0 (noting that utilities provide high dividends as mature businesses with low growth rates).

[43] *Ibid.*

[44] *Ibid.*

[45] The EEI Index "measures total shareholder return for 43 U.S. investor-owned utilities." EEI Stock Index, http://bit.ly/2VGuXdp (last visited May 21, 2019).

[46] Thomas Kuhn, EEI, *President's Letter – 2016 Financial Review* (2016), http://bit.ly/2WdMApm. As of December 31, 2017, all of EEI's index companies except for PG&E continued this trend. EEI, *2017 Financial Review* 18 (2017), http://bit.ly/2X2ffuO (noting that 42 of 43 publicly traded companies in the EEI Index were paying a common stock dividend).

owned electric companies, including power producers and companies located in other states, have already begun to feel the ripple effects from the credit downgrades. For example, Topaz Solar—a solar facility that supplies power to PG&E—was downgraded to junk status by various credit rating agencies in January 2019 because it had a contract with PG&E.[47] One rating agency explained that the downgrade, which occurred before PG&E's bankruptcy, reflects "the degradation in PG&E's creditworthiness."[48] Other power producers selling to PG&E also saw downgrades,[49] and still other companies are identified as having "material PG&E counterparty exposure."[50] Many of these latter companies operate nationally, such as Calpine Corporation, the country's largest generator of electricity from natural gas and geothermal resources, which serves customers in 24 states.[51]

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[47] See, *e.g.*, S&P Global Market Intelligence, *Topaz Solar, a Top Power Supplier to PG&E, Downgraded to Junk* (Jan. 11, 2019), http://bit.ly/2VGvo7B.

[48] *Ibid.*

[49] See *ibid.* (noting that various entities owning generation facilities that sold power to PG&E were also downgraded).

[50] *Ibid.* More than 30 companies reacted to PG&E's bankruptcy by asking the Federal Energy Regulatory Commission to issue a declaratory order finding that PG&E may not reject its power purchase agreements as part of its bankruptcy proceedings. *NextEra Energy, Inc.* v. *Pacific Gas and Electric Co.*, 166 FERC ¶ 61,049 (Jan. 25, 2019), *reh'g denied,* 167 FERC ¶ 61,096 (May 1, 2019).

[51] Calpine Corp., *Calpine Company Overview Fact Sheet* (May 2019), https://www.calpine.com/about-us.

Moreover, to the extent that investor-owned electric companies are not able to provide reliable and affordable power, this could negatively affect the economy through increased energy prices and reduced growth. For example, California suffered serious economic consequences during its 2000-2001 electricity crisis, during which an electricity supply shortage caused multiple large-scale blackouts and skyrocketing wholesale prices from April 2000 to December 2000.[52] While "the costs of these blackouts are difficult to enumerate" precisely, they "are undoubtedly significant."[53] Indeed, the direct costs from increased wholesale prices alone were striking. In comparison to 1999, when the total energy costs for wholesale power were $7.4 billion, the total energy costs were about $27 billion per year in 2000 and 2001, "burdening California consumers and businesses with almost $40 billion in added costs."[54] SDG&E customers "saw their bills double and triple during the summer of 2000."[55] Some analysts conservatively estimate that the total costs were as much as $45 billion, which was around 3.5 percent of California's yearly total economic output.[56] Economic damage of this magnitude undoubtedly has effects beyond California, which is the fifth largest economy in the world, is the most populous state in the Nation, and accounts for nearly 15% of the United

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[52] Public Policy Institute of California, *The California Electricity Crisis: Causes and Policy Options* 2 (2003), http://bit.ly/2HLtEVF.

[53] *Ibid.*

[54] *Ibid.*

[55] *Ibid.*

[56] *Id.* at 3-4.

States' gross domestic product.[57] Finally, absent intervention by this Court to confirm that the Constitution prohibits California's approach to wildfire liability, other states may soon follow suit, seeking a politically expedient way to compensate the general public for damages following natural disasters—with serious consequences for investor-owned utilities and the economies of other states.

[57] Press Release, Bureau of Econ. Analysis, Gross Domestic Product by State: Fourth Quarter and Annual 2018, Table 3 (May 1, 2019), http://bit.ly/2Juglw0 (for 2018, California GDP was 14.5% of national total).

CONCLUSION

For these reasons, and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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